Paper No. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte HARTMUT EICHINGER

Appeal No. 2003-0441
Application No. 09/297,237

ON BRIEF

Before FRANKFORT, McQUADE, and NASE, Administrative Patent Judges.

NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 20 to 31, which are all of the claims pending in this application.

We AFFIRM.

BACKGROUND

The appellant's invention relates to a playhouse made from pre-fabricated parts. A copy of the dependent claims under appeal (i.e., claims 21 to 31) is set forth in the appendix to the appellant's brief. Claim 20 reads as follows:

> A playhouse made from pre-fabricated parts, comprising:
> supporting posts having limit stops or locking elements and being formed as vertical plate-like bodies; and,
> a roof affixed to said supporting posts, said roof being a self-supporting slab resting in a horizontal direction directly upon said supporting posts.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Vinson	4,262,900	Apr. 21, 1981
O'Brian et al. (O'Brian)	4,365,799	Dec. 28, 1982
Ahrens	4,447,055	May 8, 1984

Claims 20, 25, 26 and 28 to 31 stand rejected under 35 U.S.C. § 102(b) as being anticipated by O'Brian.

Claims 22, 23 and 27 stand rejected under 35 U.S.C. § 103 as being unpatentable over O'Brian.

Claim 21 stands rejected under 35 U.S.C. § 103 as being unpatentable over O'Brian in view of Ahrens.

Claim 24 stands rejected under 35 U.S.C. § 103 as being unpatentable over O'Brian in view of Vinson.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (Paper No. 19, mailed August 27, 2002) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 18, filed May 31, 2002) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

In the Grouping of Claims section of the brief (pp. 7-8) the appellant states:

> Claim 20 is the single independent claim pending in the above-identified patent application. Because Appellant contends that O'Brian et al. neither

anticipates nor renders the presently claimed invention obvious, irrespective of whether O'Brian et al. is considered alone or in combination with additional prior art, Appellant will argue solely the anticipation rejection of independent Claim 20 in this Brief.

Accordingly, the patentability of dependent Claims 21-31 will not be separately argued, and the patentability of these claims will be allowed to stand or fall on the basis of whether independent Claim 20 is patentable.

In view of the appellant's grouping of claims, we will review only the rejection of independent claim 20 under 35 U.S.C. § 102(b) as being anticipated[1] by O'Brian and the patentability of dependent claims 21-31 will stand or fall on the basis of whether independent claim 20 is patentable.

The appellant argues (brief, pp. 8-13) that O'Brian discloses a folding slide and platform structure, not a playhouse and no "roof" structure is either disclosed in, or suggested by, O'Brian. The appellant does not agree with the examiner that the claimed roof is readable on[2] O'Brian's platform 96. The appellant contends that the examiner's interpretation of "roof" and the application of O'Brian, is neither reasonable

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[1] A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. Verdegaal Bros. Inc. v. Union Oil Co., 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir.), cert. denied, 484 U.S. 827 (1987).

[2] The inquiry as to whether a reference anticipates a claim must focus on what subject matter is encompassed by the claim and what subject matter is described by the reference. As set forth by the court in Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984), it is only necessary for the claims to "'read on' something disclosed in the reference, i.e., all limitations of the claim are found in the reference, or 'fully met' by it."

nor consistent with either the appellant's specification or that of O'Brian. Specifically the appellant argues (brief, pp. 10-12):

> Appellant's Specification and claims recites a playhouse having a "roof" structure. O'Brian et al, discloses a "folding slide and platform structure." Platform (96) in O'Brian et al. is a support for children prior to using the slide disclosed therein. The crossbars (136) in O'Brian et al. are taught as being "two handrails." Nothing in O'Brian et al. discloses, suggests or hints at the possibility of the platform (96) being in any way analogous to that of a "roof" structure, which would be capable of supporting a finding that, perhaps, Appellant's claims did "read on" the prior art of O'Brian et al. Nothing suggests that the structure of O'Brian et al. can be used as a playhouse. Quite the contrary: Slide (82) and the ladder-like treads (100) of the ladder leading up to the platform (96) in O'Brian et al. (see, FIG. 5) effectively preclude the structure disclosed in O'Brian et al. as being a playhouse and, thus, preclude platform (96) as also serving as a "roof," as recited in Appellant's claims.
>
> Had the structure disclosed in O'Brian et al. been a combination slide and playhouse, where it is reasonable to find that the platform also functioned as a roof for the playhouse beneath, then Appellant could agree with the Examiner. Such, however, is not what O'Brian et al. teaches!
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> . . .
>
> Appellant is mindful of the law regarding anticipation and, Appellant respectfully submits, that the Examiner's application of the relevant law is not correct. Some affirmative disclosure in O'Brian et al. must indicate that platform 96 may be viewed as a "roof" structure by children or, at the very least, that children can occupy the area below platform 96 in the "normal" course of play.

We find the appellant's argument unpersuasive since O'Brian specifically teaches that children can occupy the area below platform 96 in the "normal" course of play and therefore the examiner was correct that the platform 96 may be viewed as a "roof" and that the folding slide and platform structure of O'Brian may then be

considered a "playhouse." In that regard, O'Brian teaches in the BACKGROUND OF THE INVENTION section (column 1, lines 34-47) that:

> One particular type of structure which has been widely sold commercially and which is described in at least one text is constructed so as to utilize a comparatively enlarged platform located at the top of a short ladder and adjacent to the upper end of a slide and is constructed so that the space underneath the platform can be utilized as a "hidey-hole" by children for play purposes. This type of structure is quite desirable because it serves several play functions. It serves as a slide but also it serves a secondary function of providing a partially enclosed more or less confined space which can be utilized in a multitude of ways in accordance with the imagination of children.

O'Brian then teaches in the SUMMARY OF THE INVENTION section (column 2, lines 15-20) that "[a] further objective of the present invention is to provide folding slide and platform structures which are constructed in such a manner as to provide adequate space underneath the platform of such structures for use as a 'hidey-hole' type item of play equipment." Additionally, in the detailed description of the embodiment shown in Figures 5-8 O'Brian teaches (column 6, lines 36-48) that:

> The panels 122 can be varied to a significant extent. If desired for play purposes or aesthetic reasons these panels may be provided with various openings 132 of various different sizes. Such openings 132 may even be large enough so as to permit a child to crawl within the space (not numbered) under the platform 96 when the structure 80 is in an open or unfolded position. If desired a panel 122 can consist merely of an open frame (not shown). In order to facilitate access to the space under the platform 96 when the structure 80 is in an unfolded or open position a particular panel 122 can be replaced by two links 134 as shown by dotted lines in FIG. 5 of the drawings.

In view of the clear teachings of O'Brian that a child crawls within the space under the platform 96 when the structure 80 is in an open or unfolded position to play, we conclude that the claimed term "playhouse" is readable on O'Brian's folding slide and platform structure and that the claimed term "roof" is readable on O'Brian's platform 96.

For the reasons set forth above, the appellant has not persuaded us that there was an error in the examiner's rejection of claim 20 as being anticipated by O'Brian. Therefore, the decision of the examiner to reject claim 20 under 35 U.S.C. § 102(b) is affirmed. The decision of the examiner to reject dependent claims 21 to 31 is also affirmed since as noted above the appellant has stated that claims 21 to 31 will stand or fall on the basis of whether independent claim 20 is patentable. See In re Young, 927 F.2d 588, 590, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987); In re Wood, 582 F.2d 638, 642, 199 USPQ 137, 140 (CCPA 1978) and 37 CFR §§ 1.192(c)(7) and 1.192(c)(8)(iv).

CONCLUSION

To summarize, the decision of the examiner to reject claims 20, 25, 26 and 28 to 31 under 35 U.S.C. § 102(b) is affirmed and the decision of the examiner to reject claims 21 to 24 and 27 under 35 U.S.C. § 103 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

CHARLES E. FRANKFORT
Administrative Patent Judge

JOHN P. McQUADE
Administrative Patent Judge

JEFFREY V. NASE
Administrative Patent Judge

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